The confusion of these two phrases, above quoted, has caused the courts a great deal of trouble, but wherever the facts have been of such a nature as to allow an initial wrong with continuing results to be differentiated from an initial wrong afterwards followed by a new wrong, they have reached the conclusion found in the California case. In the English case of *Clegg* v. *Dearden,* (1848), 12 Ad. and El. (N.S.) 575, a trespasser had broken through a wall in a mine and, after the statute had run on the original trespass, water had run through the hole and injured the plaintiff. It was held in an action on the case that there could be no recovery because leaving the hole was not a continuous trespass but only the result of the initial trespass, and the running of the statute had barred that trespass together with its results. In the case of the *National Copper Co.* v. *Minnesota Mining Co.,* (1885) 57 Mich. 83 the facts were identical with those in the English case and the conclusion was the same. In the case of *Gillette* v. *Tucker* (1902) 67 Ohio St. 106, a surgeon sewed up a sponge in a wound and left it there until after the statute had run on the original negligence of sewing it in the wound. The holding in this case, finally affirmed by the Ohio court in *McArthur* v. *Bowers,* (1905) 72 Ohio St. 656, was the same as in the cases of injury to land, above cited. The injury caused by the sponge remaining in the wound was held to be the *result* of the original wrongful act and not a new wrong, and recovery was denied the plaintiff because the statute had run on the original trespass. But in the case of *Perry County* v. *Railroad Co.* (1885), 43 Ohio St. 451, it was held that "each day's failure" to restore a bridge destroyed by fault of the defendant "was a fresh breach of an obligation" so to do; i. e., the leaving the hole in the road was a "repeated wrong" each successive day that it was so left.

In line with this last decision of the Ohio court it has recently been held in *Judd* v. *Blakeman* (1917), 175 Ky. 848, that each successive overflow of the plaintiff's land, caused by the negligent construction of the defendant, gave rise to a new cause of action, each successive overflow being treated as a "repeated wrong." There was a similar holding on the same state of facts in *Scheurich* v. *Empire District Electric Co.* (Mo., 1916), 188 S. W. 114. In the case of *Dick* v. *Northern Pac. Ry. Co.* (1915), 86 Wash. 211, where there was a continuous publication of a libel, each publication was held to constitute a separate libel and therefore a "repeated wrong," for which a recovery would be had, even if more than the statutory period had elapsed since the first insertion.

It would seem wise then to bring one's suit for "repeated wrong" rather than for "continuous trespass," and this too whether the action be for an injury to land, a wrong to the person or a slander to reputation. A more extensive consideration of this subject will appear in a later issue of this REVIEW. J. H. D.

RELEASE OF PARTICULAR JOINT TORT-FEASORS—EFFECT OF RESERVATION OF STIPULATION RESERVING RIGHT OF ACTION AGAINST OTHERS.—The problem indicated by the above heading is not so simple as when Judge Cooley wrote

concerning it, "* * * and so a release of one releases all, although the release expressly stipulates that the other defendants are not to be released." COOLEY, TORTS, [3d Ed.] 236. A very considerable following has been attracted to the opposite doctrine, the latest convert being the Supreme Court of Ohio, which recently overruled its former decisions on the subject, holding that the plaintiff could, by an express stipulation in a release to two joint tort-feasors, reserve her cause of action against those not named as releasees. *Adams Express Co.* v. *Beckwith et al.*, 126 N. E. 300 (Ohio, 1919) overruling *Ellis* v. *Bitzer*, 2 Ohio 89.

The release of the comomn law is a technical affair, involving a seal and particular words. Where a technical release, absolute in its terms and under seal, is given to one of several wrong-doers it is quite uniformly held that it is a good bar to an action against those not named in the release. The reason for this is laid in the sanctity of the seal. It cannot be controverted by parol evidence. The law presumes the release was given in full satisfaction for the injury and upon sufficient consideration. 111 Am. St. Rep. 282; *Ellis* v. *Esson*, 50 Wis. 138. The cause of action being one and indivisible, a release of one destroys it. This has been carried to its logical, if unsatisfactory conclusion, by holding that it is immaterial whether or not the one released was in fact liable. *Leddy* v. *Barney*, 139 Mass. 394. But the standing of the absolute release under seal is believed not to be impregnable. In *Rosenbaum Grain Co.* v. *Mitchell*, 142 S. W. 121, (Tex.), an intsrument under seal, given on consideration of $4000, purporting to "release and forever discharge" a railroad company from all causes of action arising from certain injuries received by the plaintiff and acknowledging full satisfaction of all liability, was held not conclusive, and parol evidence was admitted to show the intention of the parties in making the release. It was left to the jury to decide whether or not the release of all joint tort-feasors was intended. See further *El Paso and S. R. Ry. Co.* v. *Darr*, 93 S. W. 166 (Tex.); *City of Covington* v. *Westbay*, 156 Ky. 839.

Although the operation of an absolute release under seal is well-settled, the effect to be given to a reservation of a right of action against those not released is a moot point. By one line of authorities all are released, as the reservation is considered repugnant to the spirit of the release and void, because "* * * his own deed shall be taken most strongly against himself." 2 Co. LITT. § 376. This is the reasoning applied in *Gunther* v. *Lee*, 45 Md. 60, a leading case for this view. As pointed out in the course of the opinion in *Dwy* v. *Connecticut Co.*, 89 Conn. 74, the same result is reached by travelling several different roads: the cause of action for the injury, being one and indivisible, a release of one releases all; one who receives release is deemed to have committed the whole injury and to have satisfied the injured party; conclusive presumption of release of all from the presence of a seal. But the distinguishing feature of this class of cases, whether the instrument considered is under seal or not, is that they adhere to the technical view of the release and do not interpret it according to what must have been the intention of the parties making it. *McBride* v. *Scott*, 132 Mich. 176 (not under seal); *Seither* v. *Phila. Traction Co.*, 125 Pa. 397 (under seal); *Flynn*

v. *Manson,* 19 Cal. App. 400 (not under seal); *Ruble* v. *Turner,* 2 H. & N. (Va.) 38 (not under seal); *Farmers' Savings Bank* v. *Aldrich,* 153 Ia. 144 (not under seal); *L. & N. Rr. Co.* v. *Allen,* 67 Fla. 257 (under seal); *Ducey* v. *Patterson,* 37 Colo. 216 (not under seal).

Where it has been sought to avoid the technical effect of a release to one joint tort-feasor, the courts have been put to some ingenuity to find a basis for their decisions. The most common solution is to treat a release containing the reservation in question not as a release, but as a covenant not to sue, which does not discharge the cause of action. When given to a sole tort-feasor a covenant not to sue may be pleaded in bar of an action against him to avoid circuity of action, but when there are two or more joint tort-feasors and the covenant is with one of them it does not operate as a release either of the covenantee or the other tort-feasors. The former must resort to an action for breach of covenant if he is sued, and the latter cannot invoke the covenant as a bar. *Chicago* v. *Babcock,* 143 Ill. 318. It is stated that in England a transaction in the form of an actual release, whether by deed or accord and satisfaction, will be construed as being merely a covenant not to sue if it contains an express reservation of the right to proceed against the other wrong-doers. SALMOND, TORTS, [2d Ed.] 74, citing *Duck* v. *Mayeu,* (1892) 2 Q. B. 511; *Bateson* v. *Gosling,* (1871) L. R. 7 C. P. 9. In *Gilbert* v. *Finch,* 173 N. Y. 455, the court reversed its former holdings and adopted this view. It did not appear in that case whether or not the instrument was under seal, but in *Walsh* v. *Hanan,* 87 N. Y. Supp. 930, the rule was applied to such a release. See 16 HARV. L. REV. 529 for New York holdings. To the same effect are *Carey* v. *Bilby,* 129 Fed. 203; *Edens* v. *Fletcher,* 79 Kan. 139; *Kropidlowski* v. *Pfister and Vogel Leather Co.,* 149 Wis. 421. This doctrine, though it undoubtedly leads to a result in accord with the intention of the parties is at best an artificial rule of interpretation and has been criticized as amounting to judicial legislation. See 24 YALE L. JOUR. 505, commenting on the *Dwy* case.

Where effect is given to the reservation in a release, the damages of the releasor, in his later suits against remaining tort-feasors, are reduced by the amount received in consideration for the release. In *Ellis* v. *Esson, supra,* a case involving trespass to real property, it was suggested that such *pro tanto* reduction is possible only where the damages are subject to computation, as in that case, but when they rest mainly in the discretion of the court and jury a release to one would not be interpreted as a covenant not to sue but as a technical release discharging all. Though this point was necessarily overruled by the later Wisconsin case cited above, where a release with reservations was construed as a covenant not to sue in an action involving personal injuries due to acid burns, it has found its way into other decisions. *Matheson* v. *O'Kane,* 211 Mass. 91. That this situation involves no real difficulty was shown in *City of Covington* v. *Westbay, supra,* where a release to one for $750 was held no bar to an action against other joint tort-feasors though the damages were conjectural, the action being for personal injuries. The jury were instructed to find for the plaintiff only if the damage was in excess of $750 and then to the extent of the excess only. This distinction is not

generally taken and is criticized in *Robertson* v. *Trammell,* 83 S. W. 258 (Tex.); 111 Am. St. Rep. 286.

One or two other doctrines that incline away from the technical view might be examined. In *Blackmer* v. *McCabe,* 86 Vt. 303, it was said that a release under seal discharges all, but when not under seal all are not discharged unless it appears that payment has been made in full satisfaction of the wrong done. In Missouri, where private seals have been abolished, it is said that for a release to one to bar an action against other joint wrongdoers it must express full satisfaction of plaintiff's claim or declare a release in express terms. See *Judd* v. *Walker,* 158 Mo. App. 156, in which effect was given to reservation in a release. In both these jurisdictions it is probable that a reservation of further actions is held to indicate that full satisfaction has not been received. See *Chamberlain* v. *Murphy,* 41 Vt. 110. In Minnesota it seems that if an instrument is a release, it is a release of all, even though a reservation is made, but if a covenant not to sue, it has no such effect. Ann. Cases 1913-B 271, commenting on *Musolf* v. *Duluth Edison Electric Co.,* 108 Minn. 369. A similar statement is made by the Massachusetts court in *Matheson* v. *O'Kane, supra,* but exactly what constitutes a release in these states is difficult to define. It is clear, however, that something more than the presence of a reservation of plaintiff's action against remaining tortfeasors is necessary to induce the court to construe the instrument as a covenant not to sue.

In the main opinion of the *Dwy Case* a rule of interpretation is worked out which seems more satisfactory than simply calling a release with reservation of further actions against those not released, a covenant not to sue. It gives effect to the intention of the parties without doing especial violence to the common law idea of the release. The release in that case was under seal and contained the reservation under consideration. Adopting the reasoning in that case it is submitted that the ultimate test in considering the effect to be given to releases is the satisfaction of the injured party. It is true that he is entitled to but one satisfaction, but some courts, in their anxiety to apply this rule have often precluded the attainment of full satisfaction for the wrong done. A release is of no peculiar value except as it is an indication of the receipt of satisfaction, and whether there has been full satisfaction should be determined from the language used by the parties in the instrument. The old rule recognized a satisfaction in law from the presence of the seal. Consistently with this doctrine, reservations of further rights of action were considered repugnant to the release and void. The necessity for so holding when the instrument is unsealed is difficult to see, though that result has been reached in a number of cases cited above. It is doubtful if it is a necessary consequence of the presence of the seal, even where a seal is held to furnish conclusive proof of full satisfaction. This "conclusive proof" should not go beyond the words of the instrument. When the release is absolute, no question can arise; but the presumption should in all cases go only to the discharge the instrument by its terms makes. Where it expressly reserves further rights of action, the presumption of satisfaction may very well be conclusive so far as the releasee is concerned, but it is doing violence to the in-

tention of the parties as expressly set forth to allow the seal to import full satisfaction against the other wrongdoers. This is substantially the position of the court in the *Dwy* case, which is approved in the principal case, with extended quotations. The Ohio court says that written releases are to be treated as contracts between the parties, stating, "There is nothing peculiar or exceptional about contracts of release, or contracts not to sue or contracts to cease prosecuting a suit. They are presumably to be construed, if in doubt, by the same rules of arriving at the intention of the parties as any other kind of contract." For recent collections of cases with annotations and comment see 92 Am. St. Rep. 872; 111 Am. St. Rep. 282; CHAPIN, TORTS, (1917) § 37. L. E. W.

LIBEL WITHOUT INTENT.—Cases like the one put to the jury by Lusk, J. in *Harrison* v. *Smith*, 20 L. T. at p. 715, that "If the character had been purely imaginary, a creature of fancy, then, although it turns out that the plaintiff bears the name of the fictitious character, it would not be a libel at all" fairly raise the question whether or not intent is an essential element of a libel. This question is, without hesitancy, answered by law writers in the negative. ODGERS, LIBEL AND SLANDER, [5th Ed.] p. 4; *Whiting* v. *Carpenter* (Nebr., 1903) 93 N. W. 926; *Sisler* v. *Mistrot* (Tex., 1917) 192 S. W. 565; *Nash* v. *Fisher*, 24 Wyo. 535, 542. But what is meant by "intent"? The term is used in various senses. It may denote an exercise of the will-power such as is requisite to constitute a voluntary act. When the term is used in this sense, intent is not essential to the tort under discussion, for a lunatic is liable for libel. *Ullrich* v. *N. Y. Press Co.*, 50 N. Y. Supp. 788, *Dickinson* v. *Barber*, 9 Mass. 225.

If by "intent" is meant a design to produce certain results, the question of the essentiality of malice is presented. Upon this question there has been much confusion in the decisions, but "the different views, while the cause of much controversy and misunderstanding, do not in fact create divergence in the substantive law of defamation, as their ultimate effect is identical." 25 CYC. 372. The "ultimate effect" referred to is that if the publication is not justified by proof of its truth or by the privileged occasion of its publication, malice need not be proved to recover compensatory damages. 25 CYC. 374; *Sisler* v. *Mistrot, supra.* Hence, it is no defense that the defendant did not intend to injure the plaintiff (*Curtiss* v. *Mussey*, 6 Gray (Mass.) 261, 273; *Nash* v. *Fisher, supra; Haire* v. *Wilson*, 9 B. & C. 643) for every person is presumed to have intended the natural and probable consequences of his own acts. *Morris* v. *Sailer*, (Mo., 1911) 134 S. W. 98; *Hamlin* v. *Fantl*, 118 Wis. 594.

In a still different sense, the question of "intent" arose in the recent case of *Corrigan* v. *Bobbs-Merrill Co.*, (N. Y., 1920) 126 N. E. 260, *viz.*, whether or not there must be an intent to publish "of and concerning" the plaintiff. In this case, the defendant had published a novel supposing the names used and contents to be purely fictitious, but, in fact, part of the book constituted a libelous attack upon the plaintiff, describing him as one "Cornigan." The court, in holding defendant liable, irrespective of the question of intent to publish "of and concerning" the plaintiff, quoted from Holmes, J. in *Peck* v.